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# In the Supreme Court of the United States

OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, AKA OWASSO PUBLIC SCHOOLS, ET AL., PETITIONERS

*v.*

KRISTJA J. FALVO, PARENT AND NEXT FRIEND OF HER MINOR CHILDREN, ELIZABETH PLETAN, PHILIP PLETAN AND ERICA PLETAN

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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## QUESTION PRESENTED

The Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. 1232g(b)(1) (1994 & Supp. V 1999), prohibits the furnishing of federal funds to an educational institution that has a policy or practice of releasing, without parental consent, students' "education records," which are defined by FERPA as "those records, files, documents, and other materials which—(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. 1232g(a)(4)(A). The question presented is:

Whether allowing students to grade each other's homework and tests as their teacher goes over the correct answers aloud in class violates FERPA's prohibition against the release of "education records."

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

## STATEMENT

1. a. The Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. 1232g(b)(1) (1994 & Supp. V 1999), provides that "[n]o funds shall be made available under any applicable program to any educational agency or institution[1] which has a policy or

[1] For purposes of FERPA, "the term 'educational agency or institution' means any public or private agency or institution which

practice of permitting the release of education records (or personally identifiable information contained therein other than directory information [as defined in 20 U.S.C. 1232g(a)(5)]) of students without the written consent of their parents," other than in certain statutorily identified circumstances. 20 U.S.C. 1232g(b)(1) (1994 & Supp. V 1999); see also 20 U.S.C. 1232g(b)(2). The cirumstances identified by the statute in which education records may be released without written parental consent include release to other teachers and school officials who have been determined by the institution to have legitimate educational interests, officials of other schools in which the student seeks to enroll, certain state and federal educational and law enforcement officials, persons designated in a subpoena for law enforcement purposes, victims of certain crimes at a postsecondary institution, and educational testing, financial aid, and accrediting organizations. 20 U.S.C. 1232g(b)(1)(A)-(J) (1994 & Supp. V 1999); 20 U.S.C. 1232g(b)(6)(A) (Supp. V 1999).[2]

The term "education records" is defined by FERPA to mean:

> those records, files, documents, and other materials which—

is the recipient of funds under any applicable program." 20 U.S.C. 1232g(a)(3).

[2] The educational institution must "maintain a record, kept with the education records of each student, which will indicate all individuals (other than [school officials]), agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information." 20 U.S.C. 1232g(b)(4)(A).



> (i) contain information directly related to a student; and
>
> (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. 1232g(a)(4)(A). The statute excludes from its definition of "education records" several specific categories of records, including "records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute." 20 U.S.C. 1232g(a)(4)(B)(i).[3]

[3] FERPA was enacted on August 21, 1974, as Section 513(a) of the Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 571, and became effective on November 19, 1974. 20 U.S.C. 1232g note. As initially enacted, FERPA did not use the term "education records" or contain a definition of that term. It instead used different terms to describe the materials that were subject to its various restrictions. Thus, it provided parents a right to inspect "any and all official records, files, and data directly related to their children, including all material that is incorporated into each student's cumulative record folder, and intended for school use or to be available to parties outside the school or school system, and specifically including, but not necessarily limited to, identifying data, academic work completed, level of achievement (grades, standardized achievement test scores), attendance data, scores on standardized intelligence, aptitude, and psychological tests, interest inventory results, health data, family background information, teacher or counselor ratings and observations, and verified reports of serious or recurrent behavior patterns." 88 Stat. 572. It also provided parents with the right to challenge the accuracy of "their child's school records," 88 Stat. 572, and prohibited release, with

In addition to restricting release, without parental consent, of materials that constitute education records, FERPA requires that education records be made available to parents. FERPA provides that "[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children." 20 U.S.C. 1232g(a)(1)(A); see also 20 U.S.C. 1232g(a)(1)(B) (applying requirement to State educational agencies). Educational agencies and institutions also must provide parents an opportunity for a hearing "to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records." 20 U.S.C. 1232g(a)(2).

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out parental consent (except in limited circumstances), of "personally identifiable records or files." 88 Stat. 572.

Congress amended FERPA less than 45 days after its effective date and made the amendments "effective, and retroactive to, November 19, 1974." Pub. L. No. 93-568, § 2(a) and (b), 88 Stat. 1858-1862. One of the changes made by the amendments was to define the term "education records" and to insert that term in place of both the list of materials accessible to parents, and the description of the records the release of which is restricted. 88 Stat. 1859-1860.



b. Congress authorized the Secretary of Education to "take appropriate actions to enforce" FERPA and to "deal with violations," but specified that "action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with [FERPA], and he has determined that compliance cannot be secured by voluntary means." 20 U.S.C. 1232g(f); see also 20 U.S.C. 1234c. Congress also directed the Secretary to establish an office and a review board within the Department of Education for the purpose of investigating, processing, reviewing, and adjudicating violations of FERPA and complaints concerning alleged violations of the statute. 20 U.S.C. 1232g(g). Pursuant to that authority, the Secretary designated the Department's Family Policy Compliance Office (Compliance Office) to provide technical assistance to ensure compliance with the statute through voluntary means and to process complaints. 34 C.F.R. 99.60(a) and (b). The Secretary designated the Office of Administrative Law Judges as the review board. 34 C.F.R. 99.60(c).

As part of the technical assistance provided to ensure compliance with FERPA, the Compliance Office responds to inquiries from educational agencies and institutions about the statute. Pet. App. F2. In a letter dated July 15, 1993, the Director of the Compliance Office responded to an inquiry whether certain activities violate FERPA. That letter explained, *inter alia*, that "FERPA would not prohibit teachers from allowing students to grade a test or homework assignment of another student or from calling out that grade in class, even though such grade may eventually become an education record. Such papers being graded and the grades which will be assigned would fall outside the FERPA definition of education records as they are not, strictly speaking, 'maintained' by an educational

agency or institution at that point." *Id.* at F4-F5. The Director of the Compliance Office submitted a declaration in the instant case confirming that the July 15, 1993, letter correctly sets forth the longstanding position of the Department. *Id.* at F2-F3.

2. a. Respondent, Kristja Falvo, is the mother of three children who are enrolled in the petitioner school district, Owasso Independent School District No. I-011, in a suburb of Tulsa, Oklahoma. During the 1997-1998 and 1998-1999 school years, respondent objected to the practice of teachers in her children's classes having students grade one another's homework and tests while the teacher went over the correct answers in class and, after the students received back their own papers, having the students call out their grades to the teacher. Pet. App. A3, B2. Respondent complained about the practice to school counselors and to the school district superintendent, claiming that it "severely embarrassed her children by allowing other students to learn their grades." *Id.* at A3. Petitioners told respondent that her children had the option of reporting their grades to the teacher confidentially, but petitioners declined to prohibit the student grading of schoolwork. *Id.* at A3-A4.

In October 1998, respondent filed the instant action in the United States District Court for the Northern District of Oklahoma, under 42 U.S.C. 1983, seeking damages and declaratory and injunctive relief against petitioners, including the Owasso School District and various school and school district officials. Respondent alleged that the challenged grading practice violated FERPA and was unconstitutional under the Fourteenth Amendment. Pet. App. A4.



b. On April 26, 1999, the district court, ruling on cross-motions for summary judgment, entered judgment for petitioners. Pet. App. B1-B6.[4]

The district court held that allowing a student to grade the paper of another student and to have students call out their grades in class does not violate FERPA. Pet. App. B2-B4. The court relied (*id.* at B2-B3) on the Department of Education's interpretation of FERPA set forth in the July 15, 1993, letter of the Director of the Compliance Office (see *id.* at F3-F6), which explains that FERPA does not prohibit the practices at issue here because homework assignments and tests, as well as the grades assigned to them by other students in such circumstances, "would fall outside the FERPA definition of education records as they are not, strictly speaking, 'maintained' by an educational agency or institution at that point." *Id.* at F4-F5. The court noted that the Department of Education is the agency charged with enforcing FERPA, see 20 U.S.C. 1232g(f) and, as such, its interpretation of the statute "is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." Pet. App. B3 (quoting *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985)). The court rejected respondent's contention that the court should adopt the definition of "maintain" set forth in the Privacy Act of 1974, 5 U.S.C. 552a(a)(3), which includes

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[4] On October 16, 1998, in an order denying respondent's request for a temporary restraining order, the court stated that, for purposes of that motion, it was following the holdings of two other circuits that a plaintiff may bring a FERPA claim under 42 U.S.C. 1983. See Pet. App. C4 (citing *Fay* v. *South Colonie Century Sch. Dist.*, 802 F.2d 21 (2d Cir. 1986); *Tarka* v. *Cunningham*, 917 F.2d 890 (5th Cir. 1990)).

any collection or use of the material.[5] The court emphasized that Congress did not choose to incorporate that special definition into FERPA. The court instead construed "maintain" in accordance with its ordinary meaning of "preserve" or "retain" and held that the Department of Education's interpretation of FERPA was reasonable in light of that construction and did not conflict with the expressed intent of Congress. Pet. App. B4.

The district court rejected respondent's constitutional claim as well, holding that a student's "interim tests and homework assignments" "are not 'highly personal' matters worthy of constitutional protection." Pet. App. B5. The court noted that, in any event, "students are given the option of having their grade related in confidence," "students do not grade 9-week exams," and "[n]o revelation is made of a letter grade on a report card or from a student's permanent transcript." *Ibid.*[6]

3. a. The court of appeals affirmed in part and reversed in part. Pet. App. A1-A32.[7] The court affirmed

[5] The Privacy Act provides that, for purposes of that statute, "the term 'maintain' includes maintain, collect, use, or disseminate." 5 U.S.C. 552a(a)(3).

[6] The court declined to rule on respondent's motion for class certification in light of its ruling on the merits. Pet. App. B6. The court also rejected the individual petitioners' argument that they were entitled to summary judgment based on qualified immunity because, in the court's view, the rights of privacy under FERPA and the Fourteenth Amendment were clearly established at the time of the alleged violations. *Ibid.*

[7] The panel filed its original opinion on July 31, 2000, but in the court's October 4, 2000, order denying rehearing and rehearing en banc, see pp. 11-13, *infra*, the court announced that the panel had determined, on its own motion, to amend its July 31 opinion. Pet. App. D2. The court therefore ordered the original opinion withdrawn and the amended opinion filed forthwith. *Ibid.* Our description of the court of appeals' opinion is of the opinion as amended and filed on October 4, 2000, which is reported at 229 F.3d 956 and reprinted in the appendix to the petition, Pet. App. A1-A32.



the grant of summary judgment in petitioners' favor on the constitutional claim, holding that "the school work and test grades of pre-secondary school students do not rise to the level of [the] constitutionally-protected category of information," *id.* at A6, because they do not constitute "highly personal or intimate" information, *id.* at A8 (internal quotation marks omitted).

The court of appeals reversed the judgment of the district court on the FERPA claim.[8] The court first concluded that the terms "education records" and "maintain" are "clear from the statute itself" and that deference therefore was not due the Department of Education's interpretation under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984). Pet. App. A18-A19.[9] The court further held that, in any event, *Chevron* deference was not owed the agency interpretation at issue here because it was contained in an opinion letter issued by the administering agency. *Ibid.* (citing *Christensen* v. *Harris County*, 529 U.S. 576, 586-587 (2000)). The court recognized that such an interpretive letter is "'entitled

[8] The court affirmed the grant of summary judgment on the FERPA claim with regard to the individual petitioners to the extent respondent sought monetary relief. The court ruled that the individual petitioners were entitled to qualified immunity from liability for money damages because it was not clearly established that the challenged grading practice violated FERPA. Pet. App. A2-A3; A29-A32.

[9] As an initial matter, the court held that a violation of FERPA may be the basis for a suit under 42 U.S.C. 1983. Pet. App. A10-A16.

to respect' under * * * *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)," but the court found the letter and accompanying declaration to have minimal persuasive power under *Skidmore* because, in its view, they lacked sufficient reasoning, failed to take into account the breadth of the statutory language, and were stated in general terms that did not address the details of the practice at a particular school. *Id.* at A19-A20.

Turning to its own analysis of the statutory terms, then, the court of appeals first noted that there was no dispute that the grades placed on the papers by students and then reported to the teacher "contain information directly related to a student" and thereby satisfy the first element of the statutory definition of "education records." See 20 U.S.C. 1232g(a)(4)(A)(i). The only disagreement was over whether the grades placed by one student on the paper of another are "maintained * * * by a person acting for [an educational] agency or institution," for purposes of the second element of the definition. 20 U.S.C. 1232g(a)(4)(A)(ii). Pet. App. A21.

The court of appeals noted that at least some of the grades that are reported to the teacher are then recorded in the teacher's grade book. The court concluded that the grades become education records at least at that time because, in its view, a teacher's grade book and the grades it contains are "maintained * * * by a person acting for" an educational institution and therefore are "education records." Pet. App. A21-A24. The court then concluded that the grades are also "maintained * * * by a person acting for" the school, and therefore "education records," even at what the court characterized as "the more preliminary stage when one student simply writes the grade of a fellow student on homework and test papers." *Id.* at A24.



The court reasoned that when one student writes the grade of another student on the homework or test, the correcting student is a "person acting for [an educational] agency or institution." *Ibid.* (quoting 20 U.S.C. 1232g(a)(4)(A)(ii), court's alteration). And the court held that the student is "maintain[ing]" the grade, within the meaning of Section 1232g(a)(4)(A)(ii), by marking the homework or test paper, "because that student is preserving the grade until the time it is reported to the teacher for further use." *Ibid.*

Finally, the court rejected petitioners' argument that other provisions of FERPA demonstrate that Congress did not intend to include in the definition of "education records" the student grading of other students' work under the auspices of an individual teacher. Pet. App. A25-A26. Petitioners argued that a broad definition of "education records" is inconsistent with the statutory requirement that educational institutions provide a hearing to challenge education records, 20 U.S.C. 1232g(a)(2), and maintain a record of all persons who have requested or obtained access to a student's education records, 20 U.S.C. 1232g(b)(4)(A). But the court explained that "Congress could have sensibly intended to provide parents a means to challenge the accuracy of grades on individual homework and test papers," Pet. App. A26, and that schools could continue the practice of having a central custodian keep records of who was granted access even though such papers remain under the individual teacher's classroom supervision.

b. On October 4, 2000, the court entered an order denying petitioners' petition for rehearing and suggestion for en banc review. Pet. App. D1-D6.

Four judges dissented from the denial of rehearing en banc. Pet. App. D2-D6. Those judges stated that

the grades recorded by students on the papers of other students, as well as the papers themselves, do not constitute "education records" within the meaning of FERPA because a student grading another student's paper is not acting for the educational institution within the meaning of Section 1232g(a)(4)(A)(ii). *Id.* at D3. The dissenting judges questioned how grades on individual student papers could be education records when, in their view, even a teacher's grade book is normally not an education record, except in limited circumstances. *Ibid.* Moreover, even if a teacher may act for the school in recording a grade in a grade book, they continued, "it is one step removed to say that the teacher's potential receipt of that grade makes every uncompensated student that participates in the grading process 'a person acting for such agency or institution.'" *Ibid.*

The judges dissenting from the denial of rehearing en banc also expressed the view that it "seem[s] impossible, if not implausible," that educational institutions must provide the right to a hearing to challenge each of the "thousands of grades a student might receive over time" and must maintain a record of access to each grade. Pet. App. D5. They cited the Joint Statement submitted by the Senators who sponsored the 1974 floor amendment containing the current definition of "education records." *Ibid.* (citing Joint Statement in Explanation of the Buckley/Pell Amendment, 120 Cong. Rec. 39,862-39,866 (1974)); see notes 3, *supra*, & 10, *infra*. The dissenting judges noted that the Joint Statement "drew a critical distinction between an institutional record in which a grade was recorded (the accuracy of which can be challenged) and the graded material itself (the accuracy of which cannot be challenged)," and they agreed with the Joint State-



ment's conclusion "that 'education records' referred only to the former." Pet. App. D5 (citing 120 Cong. Rec. at 39,862). Finally, the dissenting judges suggested that practical difficulties will result from the panel's ruling because it means that no student may learn the grade of another. *Id.* at D6.

## DISCUSSION

The court of appeals' interpretation of the term "education records," as set forth in the Family Educational Rights and Privacy Act of 1974 (FERPA or Act), 20 U.S.C. 1232g(a)(4)(A), is contrary to the statutory text and framework and inconsistent with the interpretation of the Department of Education, which is the agency charged with administering and enforcing the statute. In our view, therefore, the court of appeals erred in concluding that FERPA prohibits students from grading the homework and tests of other students in the classroom.

Nonetheless, we believe that review by the Court is not warranted at this time. The question presented was a matter of first impression for the court of appeals in this case, and the question has not been addressed by any other court of appeals in the more than 25 years since FERPA was enacted. Thus, there is no circuit conflict. In addition, the court of appeals' analysis was based, in significant part, on the absence of formal guidance by the Department of Education and the brevity of the reasoning the Department had provided in support of its interpretation in the 1993 letter that was before the court. See Pet. App. A19-A20. In response to the court of appeals' decision, the Department has determined that it will issue regulations or other formal guidance setting forth a more detailed analysis of the meaning of "education records" under

FERPA and the application of that term and of FERPA not only to the particular practice at issue in this case, but also to a variety of other practices. For example, that process will afford the Department an opportunity to consider such matters as the teacher's own handling of students' homework, tests, and classroom work and the recognition of students' performance. The regulations or guidance should be of substantial assistance to school districts and teachers about a range of issues, and should also furnish the courts (including the Tenth Circuit) in any future cases a more complete presentation of the views of the agency charged by Congress with administering and enforcing the Act. In those circumstances, we believe that it would be premature for the Court to grant review in this case to consider the meaning of "education records" under FERPA.

1. a. When a student grades another student's homework or test as a teacher goes over the answers aloud in the classroom, the homework or test and the grade placed on the paper are not being "maintained" as records or documents by an educational institution, or by "a person acting for such agency or institution," within the meaning of FERPA, 20 U.S.C. 1232g(a)(4)(A)(ii). The ordinary meaning of the word "maintain" is "to keep in existence or continuance; preserve; retain." *Random House Dictionary of the English Language* 1160 (2d ed. 1987); see also *Webster's Third New International Dictionary* 1362 (1993) (maintain: "1: to keep in a state of repair, efficiency, or validity: preserve from failure or decline"). The grading student does not keep the paper or the grade. In this case, for example, each grading student apparently returned the graded paper immediately to the student who had written the paper. See Pet. App.



C2. Only after students received back their own papers, and were in a position to review the grading by the other student, were the students called upon to submit their grades to the teachers. *Ibid.*

The student's homework or test answers that have not been graded and are initially provided to another student, as well as the grade marked by the other student that has not been adopted by the teacher, are the work product of the students. Even if the grading student submitted the other student's paper or grade directly to the teacher, rather than handing it back to the student who produced the paper, the fact that the teacher may maintain the grade (or the student's paper) on behalf of the school, thereby making it an education record, does not mean that any grade or paper that *potentially* may be so maintained for the educational institution becomes an education record from its inception.

Reviewing fellow students' work can be a useful tool in the process of learning and critical thinking. The exchange of student papers for grading or other purposes is part of the on-going educational dynamic in the classroom among students and between students and teachers. And as the judges who dissented from the denial of rehearing en banc observed, the "teacher's potential receipt of that grade" does not make "every uncompensated student that participates in the grading process" a person acting for the school in connection with the maintenance of records. Pet. App. D3.

b. The court of appeals' contrary conclusion cannot be reconciled with the purposes underlying other provisions of FERPA. The designation of a document as an education record under FERPA means not only that it is subject to restrictions against release without parental consent, but also that parents have a right to

inspect and review the record, a right to a hearing to challenge the content of the record to ensure that it is not inaccurate, misleading, or otherwise in violation of the privacy rights of the student, and a right to insert into such records a written explanation by the parents regarding the content of the records. 20 U.S.C. 1232g(a)(1)(A) and (a)(2). In addition, the school must maintain a record of all individuals, agencies, and organizations (other than the parent, eligible student and certain other authorized persons) that have requested or obtained access to a student's education records. 20 U.S.C. 1232g(b)(4)(A); 34 C.F.R. 99.32.

The court of appeals' interpretation raises questions concerning the application of those requirements to homework assignments, classroom exercises, and student evaluations and grading, and whether parents may be entitled to an opportunity to a hearing by school officials to present challenges concerning the accuracy of such materials and to insert the parent's own written explanation into the record. Imposing such an obligation on schools and teachers would constitute a dramatic departure from ordinary educational practices, and there is no indication that Congress intended that the enactment of FERPA, including its definition of "education records," would result in such a change. Rather, when Congress enacted the definition of "education records," the accompanying Joint Statement by the Senators who sponsored the legislation explicitly stated that the amendment was "not intended to overturn established standards and procedures for the challenge of substantive decisions made by the institution." 120 Cong. Rec. 39,862 (1974). The Joint Statement further noted that "[t]here has been much concern that the right to a hearing will permit a parent or student to contest the grade given the student's



performance in a course. That is not intended. It is intended only that there be procedures to challenge the accuracy of institutional records which record the grade which was actually given." *Ibid.*; see also *ibid.* (stating that hearing procedures must be adapted to different circumstances and noting that "[i]t is not the intent of the Amendment to burden schools with onerous hearing procedures").[10]

2. The Department of Education, as the agency charged with enforcing FERPA (see 20 U.S.C. 1232g(f) and (g), 1234c), interprets the statute not to prohibit students from grading other students' homework or tests in class because such papers and grades are not "maintained" by the school at that point and therefore are not "education records" within the meaning of the statute. Although the court of appeals' ruling is contrary to that longstanding and, in our view, reasonable administrative interpretation of FERPA, we believe that the Court should not review the issue at this time.

The Department of Education intends to issue regulations or other formal guidance regarding the meaning of "education records" and the application of FERPA to a range of practices concerning student papers and grading and the recognition of students' performance. The Department has received an inquiry

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[10] When Senator Buckley submitted the Joint Statement to the Senate, he explained that the amendments were intended to address certain ambiguities that had arisen from the language of FERPA as originally enacted, which itself had been offered as an amendment on the Senate floor and therefore had not been accompanied by traditional legislative history materials that would guide the agency in implementing the statute. 120 Cong. Rec. at 39,861-39,862. He stated that the Joint Statement therefore "provides a narrative and explanation of the meaning and intent of the various provisions of the amendment." *Id.* at 39,862.

from the National Education Association about the implications of the court of appeals' decision in this case, and the Department is responding by informing the Association about its intention to issue regulations or other formal guidance that will address the issues raised by the opinions in this case. The Department of Education disagrees, for example, with the suggestion in the dissent from denial of rehearing en banc in the court of appeals that the panel's ruling in this case renders invalid all school practices that may reveal students' grades. See Pet. App. D5-D6. Indeed, many such practices, including honor rolls and other awards received, are specifically allowed by FERPA. See 20 U.S.C. 1232g(a)(5)(B) (allowing publication of certain "directory information," after prior public notice of directory categories and opportunity for parents to prevent publication) and 20 U.S.C. 1232g(a)(5)(A) (defining "directory information" to include "awards received" by a student). In the past, the Department's Compliance Office has responded to questions from school officials regarding other such practices and has analyzed such practices individually, finding that some are valid under FERPA, whereas others are not. See, *e.g.*, Pet. App. F3-F6.

In any event, regardless of the questions raised by the opinions below about other school practices, the instant case presents only the narrow question of the validity under FERPA of the practice of students grading other students' homework and tests in class. Although the court of appeals discussed parental challenges to homework and test papers under FERPA, it did not definitively rule on the question concerning the circumstances or scope of any such right. See Pet. App. A26. Nor did the court decide whether having students call their grades out in class is allowed under FERPA.



See *id.* at A3 n.2, A21 n.10. Thus, the case does not present those issues or other questions that may arise regarding the treatment of students' papers and other work, in the classroom and elsewhere. For those reasons alone, this case is not a suitable vehicle for this Court to address the meaning and application of FERPA in a sufficiently broad context to furnish significant guidance to the lower courts and school administrators and teachers.

By contrast, the Department of Education is well situated to consider the meaning of "education records" and the application of FERPA in the context of a variety of common educational practices. As we have said, in response to the court of appeals' decision in this case, the Department intends to do so through the issuance of regulations or other formal guidance. We believe that such regulations or formal guidance will be of substantial benefit to the courts (including the Tenth Circuit) in any future case considering the validity of various practices under FERPA. Indeed, because the interpretation of FERPA by the agency charged with its enforcement is entitled to deference, the action the Department intends to take will have a bearing on the disposition of those legal issues by the courts. For these reasons, and because of the absence of a circuit conflict, we believe that review by the Court at this time is not warranted.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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